IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
NEWARK DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. ONE 2014 BLACK PORSCHE CAYMAN COUPE BEARING VEHICLE IDENTIFICATION NUMBER (VIN) WP0AB2A85EK191487; THE REAL PROPERTY KNOWN AS 10212 DENTON DRIVE, DALLAS, TEXAS; AND A TOTAL OF APPROXIMATELY $5,453,011.81 COMPRISED OF: $2,845,428.41 PREVIOUSLY DUE AND PAYABLE BY THE UNITED STATES MINT TO AMERICA NAHA, INC.; $2,388,091.18 PREVIOUSLY DUE AND PAYABLE BY THE UNITED STATES MINT TO WEALTHY MAX LIMITED; AND $219,492.22 PREVIOUSLY DUE AND PAYABLE BY THE UNITED STATES MINT TO XRACER SPORTS CO. LTD., Defendants *in Rem*.	§ §	Civil Action No. 2:15-cv-2036 Motion Day: October 19, 2015

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF CLAIMANTS' MOTION TO DISMISS THE AMENDED VERIFIED COMPLAINT FOR FORFEITURE *IN REM*

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Claimants submit this reply memorandum of law in further support of their Motion to Dismiss the Amended Verified Complaint for Forfeiture *In Rem* ("Amended Complaint") pursuant to Federal Rules of Civil Procedure 12(b)(3) and 12(b)(6) and, in the alternative, to sever the claims against Claimants' Property pursuant to Federal Rule of Civil Procedure 21.[1]

PRELIMINARY STATEMENT

Claimants' reply memorandum is deliberately brief. Despite filing lengthy opposition papers, the Government simply ignored most of the arguments in Claimants' Moving Memorandum. The Moving Memorandum argued that were the Court to find venue proper in the District of New Jersey based on the processing of payments through the Federal Reserve's East Rutherford facility alone, New Jersey would suddenly become home to innumerable civil forfeiture actions with no connection to New Jersey beyond an Automated Clearing House payment, and claimants would regularly be forced to litigate in an inconvenient, unfamiliar, and unfair forum. The Opposition ignored that argument. Instead, it maintained that because venue for the predicate crime of wire fraud was proper in the District of New Jersey, venue for the civil forfeiture action was likewise proper in New Jersey. But as discussed more fully below, venue for wire fraud does not lie in New Jersey. Where the Government had wires processed through New Jersey, it alleged no crime, and where it alleged evidence of a crime, it had no wires processed through New Jersey.

The Moving Memorandum argued that the June 2014 shipment labeled "counterfeit" by the Government had to be authentic because it was accepted and ultimately redeemed by the Mint.

[1] Abbreviated terms set forth herein refer to the following party submissions: the Declarations of Kenneth Loung ("Loung Decl.") and Lee Vartan ("Vartan Decl."), each dated August 27, 2015; Claimants' moving memorandum of law ("Moving Memorandum"); and the Government's opposition brief ("Opposition"). All other capitalized terms have the meanings ascribed to them in Claimants' Moving Memorandum.

The Opposition ignored that argument. Instead, the Government shut its eyes and ears to the Mint's actions, preferring to rely on its own questionable sampling and testing rather than the agency charged with keeping the nation's coinage uniform. As well, the Moving Memorandum argued that Claimants' warehouse and car were wholly unconnected to any counterfeiting activity. The Opposition ignored that argument. Instead, it argued that because the June 2014 shipment was counterfeit – the same shipment the Mint accepted and redeemed – all of Claimants' shipments must also be counterfeit, even though none of those shipments was tested and all were redeemed by the Mint.

Finally, the Moving Memorandum argued that if the Amended Complaint was not dismissed, then Claimants should be severed from the proceeding because they would be prejudiced by having to defend the action alongside defendant-claimants who were in the mutilated coin business longer than Claimants, redeemed more, and did not engage in the same due diligence. The Opposition ignored that argument. Instead, it argued that severance would prejudice the Government by forcing it to try the same case three times. In making that argument, the Government offered no evidence that the documents and witnesses necessary to prove its cases were uniform across defendant-claimants.

ARGUMENT

POINT I

VENUE IS IMPROPER IN THE DISTRICT OF NEW JERSEY.

As the Government states in its Opposition, "a civil forfeiture [c]omplaint [must] state the grounds for … venue." Opposition at 12. The Amended Complaint fails to do so.

In a civil forfeiture proceeding, venue is proper: (1) "in any district where [the property subject to forfeiture] is found," 28 U.S.C. § 1395(b); (2) "in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under [Section 981], a proceeding for forfeiture … may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought," 18 U.S.C. § 981(h); or (3) in "the district court for the district in which any of the acts or omissions giving rise to the forfeiture occurred," 28 U.S.C. § 1355(b)(1)(A).

Section 1395 is inapplicable because none of Claimants' Property is in the District of New Jersey; both the Texas Property and Loung Vehicle are in Texas, *see* Loung Decl. at ¶¶ 15-16, and the Claimant Funds are in Pennsylvania. *See* Amended Complaint at ¶ 44; Opposition at 9. Section 981 and *United States v. Goldberg*, 830 F.2d 459 (3d Cir. 1987), on which the Government relies, are likewise inapplicable because none of the Claimants has been charged with a federal crime. Accordingly, the Government is left with Section 1355.

The Amended Complaint attempts to meet its burden under Section 1355 by alleging that payments from the Mint in Philadelphia to the Claimants in Texas traveled through a Federal Reserve facility in East Rutherford, New Jersey. Amended Complaint at ¶ 7. But, as noted in the Moving Memorandum, the movement of money through the East Rutherford facility was not due to any act or omission of Claimants; rather, it was due to a quirk in the Automated Clearing House ("ACH") payments system that routes all Federal Reserve ACH payments through the East Rutherford facility. The Moving Memorandum argued that if the Court found venue was proper in the District of New Jersey based on the East Rutherford facility alone, it would make New Jersey the new home to countless civil forfeiture actions with no connection to New Jersey beyond an errant ACH payment. The Government simply ignored that argument in its Opposition, presumably eager to dramatically expand its civil forfeiture reach – and the money and other assets that come with it – even if that expansion regularly forces claimants to litigate in an inconvenient, unfamiliar, and unfair forum.

But not only does the Amended Complaint fail to allege any affirmative act or omission by Claimants in New Jersey, it also fails to allege that any act or omission "giving rise to the forfeiture" occurred in New Jersey. Although Section 1355 does not define act or omission "giving rise to the forfeiture," it can only mean one thing: an act or omission connected to one or more of the alleged predicate criminal acts such that venue for one or more of those predicate crimes would be proper in the district where the civil forfeiture action is brought. In its Opposition, the Government agrees with this definition. *See, e.g.*, Opposition at 13 (citing *One Oil Painting Entitled "Femme en Blanc" by Pablo Picasso* for the proposition that "venue is proper in any district where the crime giving rise to the forfeiture occurred").

The Amended Complaint lists 18 U.S.C. §§ 485 (counterfeiting coins), 486 (uttering coins), 487 (making or possessing counterfeit dies for coins), 545 (smuggling goods into the United States), 641 (stealing public money), 1343 (wire fraud), and 2320 (trafficking in counterfeit goods) as the predicate criminal acts. *See* Amended Complaint at ¶ 2. Venue is not proper in New Jersey for 18 U.S.C. §§ 485, 486, 487, 545, or 2320 since no activity related to counterfeiting occurred in the District of New Jersey. The Government implicitly acknowledges this in its Opposition, ignoring those predicate criminal acts in its venue argument and instead concluding that because "wire transfers … passed through a Federal Reserve Facility in East Rutherford, New Jersey, venue for the underlying criminal conduct – and, hence, this civil forfeiture action – is proper in the District of New Jersey." Opposition at 16-17. But the Government's argument conflates facts.

The Government alleges that Claimants received fraudulent payments processed through the East Rutherford facility from in or about February 2013 through in or about February 2014. *See id.* at 14-15. But just because the Government declares those payments fraudulent does not make them so. As argued in the Moving Memorandum and again below, the Amended Complaint provides no evidence beyond mere conjecture that any of Claimants' shipments prior to the June 2014 shipment were counterfeit. *See, e.g., United States v. One Gulfstream G-V Jet Aircraft*, 941 F. Supp. 2d 1, 14 (D.D.C. 2013) (noting that the heightened particularity requirement for a civil forfeiture pleading is designed to "protect property owners against the threat of seizure *upon conclusory allegations*") (emphasis added). None of those shipments was tested by the Government, and none can be, as each was melted by the Government and used to mint new coins. Accordingly, the Government has no evidence that any crime – including wire fraud – was committed prior to June 2014, and, therefore, the wire payments processed through the East Rutherford facility were not "acts or omissions giving rise to the forfeiture."

While the Government does allege that the June 2014 shipment was tested and is counterfeit, the funds to be paid for that shipment were seized by the Government before they could be processed through the East Rutherford facility. *See* Opposition at 8-9. Stated succinctly, where the Government has evidence of wires processed through New Jersey, it has no evidence of a crime, and where it alleges evidence of a crime, it has no wires processed through New Jersey. The Amended Complaint therefore fails to allege that any act or omission giving rise to the forfeiture occurred in New Jersey.

POINT II

THE GOVERNMENT HAS NOT PLED SPECIFIC FACTS WITH PARTICULARITY TO SUPPORT A REASONABLE BELIEF THAT IT CAN MEET ITS BURDEN AT TRIAL.

The Government spends several pages of its Opposition debating the appropriate pleading standard in civil forfeiture cases pre- and post-CAFRA. Claimants will not engage in that distraction. To be clear, the pleading requirements in civil forfeiture actions are "more stringent than general pleading requirements . . . [,] an implicit accommodation to the drastic nature of the civil forfeiture remedy." *United States v. $1,399,313.74 in United States Currency*, 591 F. Supp.

2d 365, 369 (S.D.N.Y. 2008) (citations omitted). They require the Amended Complaint to "state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial." Fed. R. Civ. P. Supp. R. G(2)(f); *United States v. $263,327.95*, 936 F. Supp. 2d 468, 470 (D.N.J. 2013). And the Government's burden at trial is demanding – the Government must prove that "a substantial connection exists between the property forfeited and the criminal activity defined by the statute," a showing requiring "more than incidental or fortuitous connection to criminal activity." *United States v. $119,030.00 in United States Currency*, 955 F. Supp. 2d 569, 584 (W.D. Va. 2013). The Amended Complaint and the Opposition together make clear that the Government has not satisfied its pleading burden and will never be able to meet its trial burden with respect to Claimants' Property.

A. The Government Has Not Pled Any Facts Establishing a Connection between the Texas Property and Alleged Criminal Activity.

The Amended Complaint not only fails to plead sufficiently detailed facts establishing a substantial connection between the Texas Property and the predicate criminal acts, it fails to plead any facts connecting the Texas Property to criminal activity. The Texas Property was purchased on January 28, 2009, years before America Naha was even established, and the mortgage was paid in full on February 20, 2013. *See* Amended Complaint at ¶¶ 47, 53-54. The monies used to pay off the mortgage came, in part, from payment from the Mutilated Coin Program for a shipment redeemed by Claimants in or about February 2013. *See id.* at ¶¶ 53-54; Opposition at 27. There is no allegation in the Amended Complaint that the February 2013 shipment was counterfeit. To the contrary, the shipment was redeemed by the Mint, melted, and used to manufacture new coins.[2]

[2] The United States Secretary of the Treasury's acceptance of materials for the production of coinage constitutes a final decision that is not reviewable by a United States court. *See* 31 U.S.C. § 5111(c).

The Government's only argument that the February 2013 shipment was counterfeit is that because the June 2014 shipment was allegedly counterfeit, every America Naha shipment that came before it was also counterfeit. Not only does this argument fail to meet the more stringent pleading requirements required in civil forfeiture actions, it is provably false: the February 2013 shipment was authentic since, if it were not, the Mint would not have accepted, melted, and ultimately redeemed it. Moreover, the Government is well aware that previous shipments from defendant-claimants were authentic. *See* Vartan Decl. at ¶ 2, Exh. A.

B. The Government Has Not Pled Any Facts Establishing a Connection between the Loung Vehicle and Alleged Criminal Activity.

The same argument applies with equal force to the Loung Vehicle. The Government concedes that Claimants purchased the Loung Vehicle, in full, on October 16, 2013. *See* Amended Complaint at ¶¶ 55, 57; Opposition at 28. Again, Claimants used monies obtained through the Mutilated Coin Program to make the purchase. And again, the Government provides no evidence that the October shipment for which those monies were paid was counterfeit. The Government does not offer test results from the October shipment or allege that the Mint rejected it. Instead, it dusts off the same, provably false argument advanced above: because the June 2014 shipment was allegedly counterfeit, all of Claimants' previous shipments must also be counterfeit, notwithstanding that none of those shipments was tested by the Government and all were accepted and redeemed by the Mint.

C. The Government Has Not Pled Sufficiently Detailed Facts Establishing a Substantial Connection between the Claimant Funds and the Alleged Criminal Activity.

As discussed above, the Government's forfeiture argument can be distilled as follows: because there is evidence that the June 2014 shipment was counterfeit, all of Claimants' shipments prior to June 2014 must also be counterfeit and Claimants' Property subject to forfeiture. For the reasons argued above, the Government's reasoning is flawed. But it is also flawed for a second reason: the Government has not pled sufficiently detailed facts establishing that the June 2014 shipment itself was counterfeit. The Opposition does not dispute or even address a fundamental inconsistency in the Amended Complaint – if the June 2014 shipment was counterfeit, why is it now in our collective pockets in the form of new coins? There are only two possible explanations: (1) the Mint permitted the manufacture of coins outside its own mandated specifications; or (2) the June 2014 shipment was authentic. The second explanation, of course, is the more likely.

The Government chooses to ignore these arguments, contending that "[a]t this early stage, the test is not whether the Government ultimately will prevail on its claim[,] [but] [r]ather … whether the Complaint sets forth sufficient facts to permit a reasonable belief for pleading purposes that the currency was the proceeds of a crime and was therefore subject to forfeiture." Opposition at 21 (quotations and citations omitted). The Government misses Claimants' point. Claimants do not argue that the Government will not prevail on its forfeiture claims; Claimants argue that based on the facts in the Amended Complaint, the Government cannot legally prevail on its forfeiture claims – ever. The Government will never be able to show a "substantial connection" between the Claimant Funds and criminal activity because the Amended Complaint itself acknowledges that the June 2014 shipment was redeemed by the Mint. Simply, it was not counterfeit. And if the June 2014 shipment was not counterfeit, then the cornerstone of the Government's argument that the Texas Property and Loung Vehicle were purchased with criminally-derived proceeds – i.e., if one of Claimants' shipments was counterfeit, then all of Claimants' shipments must be counterfeit – falls away. While the Government may be correct that the action is at an "early stage," it is not too early to know that the Government will never carry its burden at trial.

For these reasons, the Amended Complaint must be dismissed. *See One Gulfstream G-V Jet Aircraft*, 941 F. Supp. 2d 1 (dismissing claims for *in rem* forfeiture where the government failed to plead specific facts indicating that the property was derived from or traceable to illicit activity); *$1,399,313.74 in United States Currency,* 591 F. Supp. 2d 365, 373 (dismissing forfeiture complaint for failure to plead facts to support that funds to be forfeited were "the proceeds of some form of unlawful activity that [could] be traced to identified narcotics or other criminal activity"); *see also United States v. One White Crystal-Covered "Bad Tour" Glove and Other Michael Jackson Memorabilia,* No. 11-3582-GW SSX, 2012 WL 8455336 (C.D. Cal. Apr. 12, 2012) (dismissing forfeiture complaint where vague and generalized allegations proffered by the government did not support any of the government's theories for forfeiture).

POINT III

THE GOVERNMENT'S FORFEITURE CLAIMS AGAINST CLAIMANTS' PROPERTY MUST BE SEVERED.

The Government opposes Claimants' severance motion arguing that severance is unwarranted because "the underlying issues are substantially the same." Opposition at 29. In making that argument, the Government is careful to avoid a small, but crucial difference between its original complaint and the Amended Complaint. In the Amended Complaint, the Government abandoned conspiracy as a predicate criminal offense. *Compare* Complaint at ¶¶ 2, 7-8 *with* Amended Complaint at ¶¶ 2, 8. It did so for the reasons spelled out in Mr. Loung's moving declaration: Mr. Loung has never done business with Wealthy Max Limited, Glory Smart, or XRacer Sports Co. Limited, and had never even heard of those companies before this action, *see* Loung Decl. at ¶ 8; Mr. Loung does not know nor has he ever met Matthew Wong, Chan Kai Yan, or Chang Kyi, *see id.* at ¶ 9; and prior to this action, Mr. Loung was not aware that these individuals imported mutilated coins from China, *see id.* If the "underlying issues" were truly "substantially the same," the Government would never have excised conspiracy as a predicate crime. The Amended Complaint draws no connections among America Naha, Wealthy Max Limited, and XRacer Sports Co. Limited or their principals. There is no allegation that the three companies obtained mutilated coins from a common source in China, used a common broker, or imported their coins to a common port. The only thing that is "substantially the same" across defendant-claimants is that all three companies imported mutilated United States coins from China to the United States. That is hardly a commonality so compelling as to require a joint trial, particularly where a joint trial would result in substantial prejudice to Claimants. *See Gary v. Albino*, No. 10-886 (NLH), 2010 WL 2546037, at *3-4 (D.N.J. June 21, 2010).

The Government does not dispute that America Naha differs markedly from Wealthy Max Limited and XRacer Sports Co. Limited in business practices, number of shipments redeemed through the Mutilated Coin Program, and assets subject to forfeiture. Unlike the other defendant-claimants, Mr. Loung was in the mutilated coin business for a mere two years before the Government seized his property. *See* Loung Decl. at ¶ 2. Prior to entering the business, Mr. Loung undertook significant due diligence to confirm that the coins he would be importing from China and redeeming through the Mint were authentic. *See id.* at ¶ 4. Moreover, America Naha's four shipments account for just $6.4 million of the approximately $47 million disbursed by the Mint to the defendant-claimants through the Mutilated Coin Program. *See id.* at ¶ 5; Amended Complaint at ¶¶ 18, 49. Forcing Claimants to defend this action alongside businesses and individuals who were in the mutilated coin business longer than Mr. Loung was, did not take the same precautionary measures as Mr. Loung did, and who received substantially more money through the Mutilated Coin Program than Mr. Loung received would work a substantial prejudice on Claimants. Moreover, it would allow the Government to do at trial what it attempts to do in the Amended

Complaint – substitute big numbers, long durations, and the circumstantial inferences that inevitably follow for actual facts that the defendant-claimants were engaged in counterfeiting. Even if the Government is correct that it is impossible that every mutilated coin redeemed from China is authentic, it is certainly possible that every mutilated coin redeemed by Claimants from China is authentic.[3] If Claimants are forced to defend a $47 million action rather than a $6.4 million action, that defense will be considerably more difficult to muster.

The Government's sole response to Claimants' prejudice argument is that severance would prejudice the Government by making it try the same case three times. *See* Opposition at 30. But for the reasons stated above, the cases against each of the defendant-claimants are distinct. The documents and witnesses necessary for the Government to prove its case against Claimants are different from the documents and witnesses necessary for the Government to prove its case against Wealthy Max Limited, which are different from the documents and witnesses necessary for the Government to prove its case against XRacer Sports Co. Limited. Simply, whatever minimal prejudice the Government will suffer from severance is far exceeded by the prejudice Claimants will suffer if their motion is denied.

CONCLUSION

For the foregoing reasons, as well as those previously set forth in Claimants' Moving Memorandum, Claimants respectfully request that the Court dismiss the Amended Complaint with prejudice or, in the alternative, sever the Government's claims against Claimants' Property.

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[3] According to one source, an average "junked" automobile in the United States contains $1.65 in loose change when it is shredded. And according to that same source, as many as 14 million automobiles are recycled in the United States each year. *See* ADAM MINTER, JUNKYARD PLANET 223 (Bloomsbury Press 2013). Accordingly, there is as much as $23 million in United States coins at automobile recyclers each year; China is one of the largest importers of scrap metal from the United States. *See* Amended Complaint at ¶ 32. *See also* Vartan Decl. at ¶ 2, Exh. A.

Dated: New York, New York
October 13, 2015

Respectfully submitted,

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By:_____/s/ Lee Vartan______
LEE VARTAN

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2015, a true copy of the REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF CLAIMANTS' MOTION TO DISMISS THE AMENDED VERIFIED COMPLAINT FOR FORFEITURE *IN REM* was served on all parties' counsel by filing the same on the Court's Electronic Case Filing System ("ECF"), which automatically causes a notification of the filing to ECF participants of record.

Dated: New York, New York
October 13, 2015

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